Lee Yee Yew (Administrator for the estate of Lee Teong Lee, deceased) v United Oriental Assurance Sdn Bhd and another appeal

HIGH COURT (KOTA BHARU) — CIVIL APPEAL NO 12–77 OF 1995
IDRIS J
8 FEBRUARY 1998

Immigration *— Illegal entry via an unauthorized route — Whether there exist any 'other reasonable cause' as envisaged in s 5(1) to enable re-entry to Malaysia through an illegal or unauthorized route — Onus of establishing the existence of 'other reasonable cause' — Whether illness of father warranted deceased's urgent return so as to constitute 'other reasonable cause' — Immigration Act 1959/63 s 5(1)*

Insurance *— Contract of insurance — Exclusion clause — Insurance policies not to cover death or disablement while committing or attempting to commit unlawful act — Whether act of deceased in crossing the Golok river in the way he did was forbidden by law — Whether third party could still avail itself of the benefits derived under the policies — Immigration Act 1959/63 s 5(1)*

The first plaintiff was the administrator of the estate of his deceased son ('the deceased') while the second plaintiff was the employer of the deceased. The deceased and the second plaintiff had taken out insurance policies on the life of the former ('the policies') from the defendants ('the insurers'). The policies contained an exclusion clause in that the policies do not cover death or disablement suffered by the insured or life insured while committing or attempting to commit any unlawful act. The deceased drowned when the boat he was in capsized while crossing the Golok river via an unauthorized route. The plaintiffs' claims for payment of insurance moneys under the policies were rejected by the defendants. Consequently, the respective plaintiffs filed their claims in the sessions court.

The defendants contended that the act of the deceased in crossing the river in such circumstances was tantamount to committing or attempting to commit an unlawful act, ie by re-entering or trying to re-enter Malaysia through unauthorized or unapproved point of entry, contrary to the Immigration Act 1959/63 ('the Act'). The plaintiffs however claimed that the incident fell well within the province of 'other reasonable cause' allowed by the section, thereby making it lawful for the deceased to cross the river and re-enter Malaysia through the unauthorized point of entry. This was due to the deceased being required to be back home as his father ('SP1') was down with high fever. Counsel further submitted that even if the deceased had committed a criminal act, that would not affect the right of innocent third parties from getting the moneys.

The learned sessions court judge made a finding of fact in his judgment that the deceased had committed an offence under the Act and the exception to s 5(1) of the Act could not be invoked to make it lawful for the deceased's unlawful act, and that there did not exist any 'other reasonable cause' as envisaged in s 5(1) to enable the deceased to re-enter Malaysia through an illegal or unauthorized route. The plaintiffs appealed.

Held, dismissing the appeals:

(1) The words under the exclusion clause are clear and unambiguous and though such clause is to be construed against the insurers with utmost strictness, nevertheless those words, given their ordinary meanings manifest clear intentions of the parties and which intentions must be made to prevail. It is clearly stated under the exclusion clause that the policies do not cover death or disablement while committing or attempting to commit any unlawful act and that the expression 'any unlawful act' seems to mean any act forbidden by law. Thus, it is clear that the act of the deceased in crossing the Golok river in the way he did was forbidden by law as it was contrary to s 5(1) of the Act (see p 768D–F).

(2) The onus of establishing the existence of 'other reasonable cause' is on the party which asserts it and from the assistance that has been derived from certain authorities, it seems to suggest that the expression means taking in every cause which in a given situation, appears to be reasonable to a court justifying departure of the law. Judging from the events that occurred, it would appear that SP1's illness, if at all he was ill, hardly warranted any call for the deceased's urgent return so as to constitute 'other reasonable cause' which would justify the deceased's attempt to re-enter Malaysia through an illegal or unauthorized route. Moreover, the trial judge's findings of fact were supported by evidence and authorities, and should not be disturbed (see pp 769C, F–H and 770A).

(3) Considering the facts in the instant appeal and the authorities quoted, even the third party could not also avail himself of the benefits derived under the policies if by their terms and conditions, the insurers could repudiate the policies. Unless the policies otherwise provide or where a case of estoppel arises against the insurers, the right of any person claiming through the deceased assured was no greater than the assured himself (see p 771I); *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602 followed.

[Bahasa Malaysia summary

Plaintif pertama merupakan pentadbir harta pusaka anak lelakinya ('si mati') manakala plaintif kedua adalah majikan si mati. Si mati dan plaintif kedua telah mengambil polisi insurans nyawa ke atas si

A mati ('polisi tersebut') daripada defendan ('penanggung insurans'). Polisi tersebut mengandungi fasal ketakmasukan di mana polisi tersebut tidak melindungi kematian atau ketakdayaan yang ditanggung pengambil insurans atau nyawa yang diinsuranskan ketika melakukan atau cuba melakukan sebarang tindakan yang menyalahi undang-undang. Si mati lemas apabila sampan yang dinaikinya terbalik semasa menyeberangi sungai Golok melalui jalan yang tidak dibenarkan. Tuntutan plaintif-plaintif untuk bayaran wang insurans di bawah polisi tersebut telah ditolak oleh defendan. Sehubungan dengan itu, plaintif masing-masing memfailkan tuntutan mereka di mahkamah sesyen.

C Defendan menghujahkan bahawa perbuatan si mati dalam menyeberangi sungai dalam keadaan sedemikian telah membawa kepada tindakan melakukan atau cuba melakukan tindakan yang menyalahi undang-undang, iaitu dengan memasuki semula atau cuba memasuki semula ke Malaysia melalui tempat masuk yang tidak dibenarkan atau yang tidak diluluskan, bercanggah dengan Akta Imigresen 1959/63 ('Akta tersebut'). Walau bagaimanapun, plaintif-plaintif menuntut bahawa kejadian tersebut jatuh dalam lingkungan 'sebab munasabah yang lain' yang dibenarkan oleh s 5(1) Akta tersebut, dengan itu menjadikannya sah untuk si mati menyeberangi sungai dan memasuki ke Malaysia semula melalui tempat masuk yang tidak dibenarkan. Ini adalah disebabkan si mati dikehendaki pulang ke rumahnya kerana bapanya ('SP1') sakit demam panas. Peguam selanjutnya berhujah bahawa jika pun si mati telah melakukan kesalahan jenayah, ia tidak menjejaskan hak pihak ketiga yang tidak bersalah daripada mendapatkan wang itu.

F Hakim mahkamah sesyen yang arif telah membuat keputusan fakta dalam penghakiman beliau bahawa si mati telah melakukan kesalahan di bawah Akta tersebut dan kekecualian kepada s 5(1) Akta tersebut tidak boleh digunakan sebagai membenarkan kesalahan yang dilakukan si mati, dan bahawa tidak wujud sebarang 'sebab munasabah yang lain' seperti mana yang dibayangkan dalam s 5(1) untuk membolehkan si mati memasuki semula ke Malaysia melalui jalan yang tidak sah atau yang tidak dibenarkan. Plaintif-plaintif merayu.

Diputuskan, menolak rayuan-rayuan:

H (1) Perkataan-perkataan di bawah fasal ketakmasukan adalah jelas dan walaupun fasal sedemikian hendaklah ditafsirkan terhadap penanggung insurans dengan tegas, namun begitu perkataan-perkataan itu jika diberikan makna yang biasa akan mencerminkan niat sebenar pihak-pihak yang mana niat mestilah mengatasi segala-galanya. Ia dinyatakan dengan jelas di bawah fasal ketakmasukan bahawa polisi tersebut tidak merangkumi kematian atau ketakdayaan ketika melakukan atau cuba melakukan sebarang tindakan yang menyalahi undang-undang dan bahawa ungkapan 'sebarang tindakan yang menyalahi undang-undang' seolah-olah

bermakna sebarang tindakan yang dilarang oleh undang-undang. Justeru itu, adalah nyata bahawa tindakan si mati dalam menyeberangi sungai Golok seperti mana yang dilakukannya adalah dilarang dari segi undang-undang kerana ia bercanggah dengan s 5(1) Akta tersebut (lihat ms 768D–F).

(2) Beban membuktikan kewujudan 'sebab munasabah yang lain' terletak pada pihak yang menegaskannya dan dengan bantuan yang didapati daripada beberapa pihak berkuasa tertentu, ia nampaknya menyarankan bahawa ungkapan itu bermakna mengambil kira setiap kausa yang mana dalam sesuatu keadaan menampakkan munasabah kepada mahkamah untuk memberi justifikasi kepada penyimpangan daripada undang-undang. Berdasarkan daripada kejadian yang berlaku, nampaknya keuzuran SP1, jika pun ia benar-benar sakit, tidaklah mewajarkan si mati kembali pulang dengan tergesa-gesa bagi mewujudkan 'sebab munasabah yang lain' yang memberi alasan yang kukuh kepada percubaan si mati untuk memasuki semula ke Malaysia menerusi jalan yang tidak sah atau yang tidak dibenarkan. Lebih-lebih lagi, penemuan fakta hakim disokong oleh keterangan dan autoriti-autoriti, dan tidak patut diganggu (lihat ms 769C, F–H dan 770A).

(3) Dengan mempertimbangkan fakta-fakta dalam rayuan ini dan autoriti-autoriti yang disebut, pihak ketiga sekalipun tidak akan berjaya mendapat manfaat daripada polisi tersebut sekiranya penanggung insurans boleh menolak polisi tersebut menerusi terma dan syarat mereka. Melainkan polisi tersebut memperuntuk sebaliknya atau di mana suatu kes estopel timbul terhadap penanggung insurans, hak sesiapa yang menuntut melalui si mati sebagai pengambil insurans tidak melebihi hak pemegang polisi sendiri (lihat ms 771I); *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602 diikut.]

[*Editorial note*: The plaintiffs have applied for leave to appeal to the Court of Appeal vide Court of Appeal Application No D–08–49 of 1998.]

Notes

For cases on immigration, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2396–2424.

For cases on contract of insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 26–29.

Cases referred to

Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602 (folld)
Cornish v Accident Insurance Co Ltd (1889) 23 QBD 453 (refd)
Hardy v Motor Insurer's Bureu [1964] 2 All ER 742 (refd)
Tinsley v Milligan [1992] 2 All ER 391; [1993] 3 All ER 65 (refd)

Legislation referred to

Immigration Act 1959/63 s 5(1)

Appeal from: Civil Suit Nos 52–517 of 1992 and 52–578 of 1992 (Sessions Court, Kota Bharu)

Brijnandan Singh Bhar (*Brijnandan Singh Bhar & Co*) for the plaintiffs.
Rasamani Kandiah (*Khoo & Sidhu*) for the defendants.

Idris J: Two civil actions bearing Registration Nos 52–517–92 and 52–578–92 were ordered to be consolidated as they appeared to bear some common questions of law and fact and the defendants in both cases were the same. The two actions were tried at the Sessions Court, Kota Bharu. For easy reference, I term the plaintiff in 52–517–92 as the first plaintiff while the plaintiff in 52–578–92 as the second plaintiff.

From the notes of evidence, the following facts have emerged and was hardly in dispute. The first plaintiff is the administrator of the estate of his deceased son named Lee Teong Lee and is bringing this action for the benefit of the deceased's estate and also for the deceased's daughter Lee Hui Nee while the second plaintiff is the employer of the deceased.

The deceased during his life time took out a 'Selective Benefits Personal Accident Policy' from the defendants ('the insurers') effective from 24 April 1988 to 23 April 1989. The second plaintiff also took out from the same defendants a 'Group Personal Accident Policy' effective from 17 June 1987 to 16 June 1988 and was renewed for a further 12 months from 17 June 1988 to 17 June 1989 (see pp 70–80 of the appeal record). The two policies contain various fundamental terms and conditions which are almost similar to each other except for certain variations brought about to suit the circumstances. During the currency of both policies, the defendants undertake in the event of death of the insured under the 'Selective Benefits Personal Accident Policy' or of the life insured in respect of the other policy, and in both cases death occur in circumstances as specified in the policies, to pay the insured sum of RM50,000 to the deceased's legal personal representative or the second plaintiff, as the case may be, but such payments are expressed to be subject to the terms provisos and conditions contained in the policies or endorsed thereon.

On perusal of both policies, they show that there exists certain 'exclusion clause' in that the policies do not cover death or disablement which arises in circumstances as detailed therein. And one of the circumstances is that they do not cover death suffered by the insured or life insured while committing or attempting to commit any unlawful act.

The evidence further shows that on 1 August 1988 at about 7.30 pm the deceased with two friends named Wong Yoke Seng (SP3) and Lim Kok Meng left for Golok via an unauthorized route. Whilst in Golok, they had their food and drinks until the early hours of the following morning when all the three left for Kota Bharu also via the same unauthorized route, ie by crossing the Golok river in a small motorized sampan. However,

before they could reach the Malaysian side of the river, the sampan capsized and the deceased perished in the water while SP3 and Lim Kok Meng managed to swim to safety. The body of the deceased was recovered on 8 August 1988. Sometime later, the defendants were informed of this tragic incident and claims for payment of insurance moneys under both policies were made to them, but were, however rejected. Consequently, the respective plaintiffs filed their claims in the sessions court and after a full hearing the sessions court judge dismissed both claims with costs. Being dissatisfied with the said decisions, the two plaintiffs now appeal.

It appears that the defendants in resisting the claims relied upon the 'exclusion clause' as stated above. It was the contention of the defendants that the act of the deceased in crossing the river in such circumstances was tantamount to committing or attempting to commit an unlawful act, ie by re-entering or trying to re-enter Malaysia through unauthorized or unapproved point of entry, contrary to the Immigration Act 1959/63.

To my mind, the words under the 'exclusion clause' are clear and unambiguous and though I am not unmindful that such clause is to be construed against the insurers with utmost strictness, nevertheless those words, given their ordinary meanings manifest clear intentions of the parties and which intentions must be made to prevail. It is clearly stated under the 'exclusion clause' that the policies do not cover death or disablement while committing or attempting to commit any unlawful act and that the expression 'any unlawful act' seems to mean any act forbidden by law. Thus said, it is clear that the act of the deceased and his two friends in crossing the Golok river in the way they did was forbidden by law as it was contrary to s 5(1) of the Immigration Act 1959/63. Be that as it may, the plaintiffs attempted to show the incident as coming within the exception to that section. Section 5(1) of the Immigration Act reads:

> (1) The Minister may, by notification in the *Gazette*, prescribe approved routes and declare such immigration control posts, landing places, airports or points of entry, as he may consider to be necessary for the purposes of this Act, to be immigration control posts, authorized landing places, authorized airports or authorized points of entry, as the case may be, *and no person shall, unless compelled by accident or other reasonable cause*, enter or leave Malaysia except at an authorized landing place, airport or point of entry. (Emphasis added.)
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence against this Act.

The plaintiffs claim that the court ought to conclude that the case fell well within the province of 'other reasonable cause', thereby making it lawful for the trio, especially the deceased to cross the river and re-enter Malaysia through unauthorized point of entry. This is due to the deceased being required to be back home as his father (SP1) was down with high fever and being 70 years of age, it was thought that the deceased being the eldest son and resided with the father ought to be nearby, and it so happened that at that hour the authorized route had been closed.

As submitted by counsel for the plaintiffs, 'each and everyone of us gets sick at one time or other. Unless the sickness is of such a scale, we do not call up relatives or friends. For the brother of the deceased to have called the eldest brother, the deceased to come back must have caused concern to the brother that the deceased should be with the father with whom he lives'. Counsel went on to submit that '...the father of the deceased was 70 years old and at that age high fever (demam panas) is of great concern to the family ...'.

The onus of establishing the existence of 'other reasonable cause' is on the party which asserts it and from the assistance that has been derived from certain authorities, it seems to suggest that the expression means taking in every cause which in a given situation, appears to be reasonable to a court justifying departure of the law.

In evidence, SP1 said that on the evening prior to the deceased's death, he had a high fever but surprisingly, despite his age and down with high fever, neither he nor any other person had ever thought of summoning a doctor to attend to him and what is more surprising the evidence of SP2 (another son) seems to shed some dubieties on the veracity of SP1 evidence when SP2 claims that his father had a slight illness, ie he was just feeling slightly unwell. Such piece of evidence appears to me as an attempt by the witness to obiate creating an avenue for criticism from counsel for the defence for not summoning a doctor. Further, according to SP2 the deceased had to be informed of the father's indisposition but it is appalling to note that when told of the deceased's disappearance in the river, the father and SP2 went to Rantau Panjang to help search for the body and the father managed to be at the scene for some period of time in spite of his illness. Indeed the act and conduct of the father looked somewhat odd and inconsistent with that of a person of advanced age and down with high fever!

Judging from the events that occurred, it appears to me that SP1's illness, if at all he was ill, hardly warranted any call for the deceased's urgent return, and in particular, bearing in mind that when the deceased left for Golok at about 7.30 pm the same evening (only some hours earlier) no one had ever tried to dissuade him from going for reason of his father's illness.

The learned sessions court judge, in his judgment made a finding of fact that the deceased had committed an offence under the Immigration Act 1959/63 and the exception to s 5(1) of the Act could not be invoked to make it lawful for the deceased's unlawful act. There did not exist any 'other reasonable cause' as envisaged in s 5(1) to enable the deceased to re-enter Malaysia through an illegal or unauthorized route. He had also considered the fact that although it had become a normal practice for people going and coming back from Golok by river and no action had been taken by the authorities, it, nevertheless, did not legalize an otherwise clearly an illegal act. The learned sessions court judge before coming to that findings had carefully studied the facts, had the advantage of hearing the witnesses and assessing their credibilities and had also considered the

authorities quoted by counsel from both sides. For myself, I consider that such findings of fact are supported by evidence and authorities and should not be disturbed. I do not find any ground to suggest that the sessions court judge had erred in his evaluation of fact and application of the law.

The final point raised by counsel for the plaintiffs is the deprivation of the policy moneys allegedly due to the first plaintiff as administrator of the estate of the deceased assured under the Selective Benefits Personal Accident Policy and to the second plaintiff under the Group Personal Accident Policy.

It is contended that the refusal of the defendants to pay the policy moneys had greatly and unjustly affected the beneficiary of the estate of the deceased and the second plaintiff. Counsel goes on to say that according to the contract between the parties concerned, the defendants had agreed on the death of the deceased to pay to the selected beneficiary, ie the deceased's 12-year old daughter and the second plaintiff a sum of RM50,000 each. Counsel further submits that even if the deceased had committed a criminal act, that would not affect the right of innocent third parties from getting the moneys. A number of authorities are quoted to support his argument. They are amongst others:

(i) *Hardy v Motor Insurer's Bureu* [1964] 2 All ER 742. This case concerns a statutory requirement for taking out a policy of insurance against third party risks so that the third party can claim from the insurance company for the injuries sustained by him in the event of him being involved in a motor accident. The whole intention of the law is to protect the interest of the third party.

(ii) *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453. This case stresses the importance of bearing in mind the objects of the parties to the contract so that the contract must not be construed so as to defeat that object.

(iii) The few other cases quoted, seem to decide whether death was accidental or otherwise for the purpose of claims under the insurance policies.

With respect I do not consider these cases to be of assistance to the plaintiffs. The last case quoted by counsel was *Tinsley v Milligan* [1993] 3 All ER 65 (House of Lords), a case which relates to the enforceability of a contract by the court particularly when it involves issue of public policy or public conscience test. In passing, I wish to mention that this issue was never raised by counsel for the defence either before me or in the court below but since counsel for the plaintiffs has pursued this line of argument before me, I feel I am not out of place to make some observations thereon. In his submissions, counsel quotes an excerpt from the judgment of Nicholls LJ in the Court of Appeal in *Tinsley*'s case — see [1992] 2 All ER 391 at p 398:

> ... the court should keep in mind that the urderlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequenses of refusing relief. The ultimate decision calls for a value judgment.

A But down the same paragraph, his Lordship went on to quote some observations by Lord Diplock in *Hardy*'s case in which his Lordship associated himself with them:

> ... [the rule] is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently antisocial to justify the court's refusing to enforce that right ... .

C On the facts, the Court of Appeal held that 'far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so'. The said decision was moreover upheld by the House of Lords.

There is again the case of *Beresford v Royal Insurance Co Ltd* [1938] D 2 All ER 602, a decision also of the House of Lords, in which the court refused to enforce a contract of insurance. The facts in that case are that by a condition in an insurance policy issued in 1925, it was provided that: 'if the life assured shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part E thereof'. The premiums were regularly paid upon the policy until 1934, when the assured committed sucide. It was found as a fact by the jury that the assured was sane at the time of his death. The Court of Appeal held that although the condition in the policy necessarily implied a positive undertaking by the company to pay if the assured died by his own hand, F sane or insane, after the expiry of a year from the commencement of the insurance, it was contrary to public policy that either a person who had committed a crime or his personal representative should be allowed to benefit by that crime. In the circumstances, the contract was therefore unenforceable.

G In that case, it appears there was a conflict between two grounds of public policy. The first was the duty of the court to enforce contracts and the other that no man or his estate should be allowed to benefit by his own crime. In the court of first instance, the judge held that sanctity of contract was of paramount importance. But the Court of Appeal held that it was the overriding duty and inherent power of the court to refuse its aid to H enforce a promise where the plaintiff had to set up his own crime or the estate of the deceased sought to benefit from a crime of the deceased. The House of Lords upheld the decision of the Court of Appeal.

To my mind, considering the facts in the instant appeal and the authorities quoted, even the third party cannot also avail himself of the I benefits derived under the policies if by their terms and conditions, the insurance can repudiate the liabilities. Unless the policies otherwise provide or where a case of estoppel arises against the insurers, the right of any person claiming through the deceased assured are no greater than the assured himself.

For the reasons stated above I dismiss both appeals with costs. Since the appeals are dismissed, I do not think I should discuss the point raised by counsel for respondents pertaining to the locus standi of the first plaintiff upon the named beneficiary attaining the age of majority and should herself take over the conduct of the proceedings in the pursuit of her claim.

Appeals dismissed.

Reported by Loo Lai Mee